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IN THE

Supreme Court of the United States

October Term, 1964

No. 1106

DAVID RATKE and MONROE CAINE,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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The brief of the United States in opposition ignores petitioners' basic contention, namely, that it would be a gross injustice to require petitioners to stand trial for the third time before appellate review can be obtained of contentions presented to, but not ruled upon by, the Court of Appeals on two prior appeals. Instead, the Government argues that this petition should be denied on highly technical grounds which do not take into account at all petitioners' substantive rights.

Quite apart from the obviously inequitable character of the Government's position, the Government's arguments do not stand up under analysis.

1. The Government suggests that the failure of the Court of Appeals to discuss petitioners' contentions and its direction of a new trial warrants the inference that the Court of Appeals had rejected plaintiffs' contentions and concluded that the indictment stated an offense. The short answer is that the Court of Appeals had at least two occasions to advise petitioners that it had considered and rejected petitioners' contentions, but failed to do so. Instead, the Court granted leave to file an appeal for the express purpose of considering these contentions. Its subsequent dismissal of the appeal was not on the ground that these contentions had already been considered, but rather on the sole ground that the Court of Appeals thought it lacked power to rule upon these questions at this stage of the proceedings, even though the same contentions had previously been raised on a prior appeal from judgments of conviction.

2. Petitioners are not asking this Court to direct the Court of Appeals to grant an untimely petition for rehearing. This is not the issue at all. Rather, it appears that the Court of Appeals had revoked its permission to file the second appeal upon the erroneous belief that it lacked power to entertain a second appeal taken to review contentions previously raised, but not ruled upon, which would have been dispositive of the entire case. Regardless of whether the second appeal be considered an "interlocutory appeal", a "petition for rehearing", or a proceeding by any other name, the Court of Appeals clearly possesses power to entertain the proceeding under the All-Writs Statute, 28 U. S. C. 1651. There can be no question and in-

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[1] Indeed, the Court of Appeals had even allowed petitioners' counsel to argue the merits of the contentions on the scheduled hearing of the second appeal, pending the Court's determination as to its power to entertain such appeal.

deed, the Government does not contend otherwise—that 28 U. S. C. 1651 vests the Court of Appeals with power to issue all writs necessary or appropriate in aid of its jurisdiction, and that Section 1651 constitutes ample authority for the Court of Appeals to have entertained the second appeal to avoid an obvious and substantial injustice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 17, 1965